

1 ALAN R. SMITH, ESQ. #1449
2 Law Offices of Alan R. Smith
3 505 Ridge Street
4 Reno, Nevada 89501
5 Telephone (775) 786-4579
6 Facsimile (775) 786-3066
7 *Email: mail@asmithlaw.com*

**ELECTRONICALLY FILED
July 27, 2009**

5 || Proposed Attorney for Debtors

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

—ooOoo—

|| In Re:

10
11 WES CONSTRUCTION COMPANY,
INC., a Nevada corporation,

Case No. BK-N-09-52177-GWZ (Lead)
Case No. BK-N-09-52178-GWZ
Case No. BK-N-09-52181-GWZ

12 HEAVY EQUIPMENT SERVICES, LLC,
a Nevada limited liability company,

Case No. BR-N-39-32181-GWZ
(Jointly Administered)

13 TRUCKING SERVICES, LLC,
14 a Nevada limited liability company,

Debtors.

7 WES CONSTRUCTION COMPANY, Adv. No. _____
INC., a Nevada corporation,

Plaintiff,

**COMPLAINT FOR RECOVERY OF
PREFERENTIAL TRANSFERS AND FOR
EQUITABLE SUBORDINATION**

20 MB FINANCIAL BANK, N.A., a
National Association.

Defendant

4 COMES NOW Plaintiff, WES CONSTRUCTION COMPANY, INC., a Nevada
5 corporation (“WES”), and complains against MB Financial Bank, N.A. (“MB Financial”) as
6 follows:

7 | //

8 | //

GENERAL ALLEGATIONS

1. The above-captioned debtors filed petitions commencing cases under chapter 11 of the Bankruptcy Code on July 6, 2009 (the “Petition Date”). The debtors continue to operate their businesses as debtors-in-possession.

2. Plaintiff, WES Construction Company, Inc. is a Nevada corporation.

3. Defendant, MB Financial Bank, N.A. is a financial institution doing business in the State of Nevada (“MB Financial”).

JURISDICTION AND VENUE

9 4. This Court has jurisdiction over this adversary proceeding pursuant to 28
10 U.S.C. §157 and §1334, and pursuant to 11 U.S.C. § 502, 510, and 547. Plaintiff believes
11 and avers that the claims for relief are “core” proceedings subject to determination by this
12 Court pursuant to 28 U.S.C. §157(b)(2)(B), (C), (E), and (F) or otherwise related matters
13 pursuant to 28 U.S.C. §1334. In the event any claim for relief is determined not to be a
14 “core” proceeding, Plaintiff hereby consents to its determination of such claim by this Court.

5. Venue is proper pursuant to 28 U.S.C. §1449.

FIRST CLAIM FOR RELIEF

(Preferential Transfers to MB Financial)

6. Plaintiff hereby incorporates each and every averment set forth in paragraphs 1 through 5 above as if fully set forth herein.

7. That on or about May 14, 2009, WES conducted an auction of certain equipment more particularly identified in Exhibit "A" attached hereto and incorporated by reference herein (hereinafter the "Sold Equipment"). MB Financial was not identified as a lien holder on any of the titles for the Sold Equipment, and did not have a security interest in the Sold Equipment.

8. At the time of the auction, and thereafter (as more specifically set forth below), MB Financial had instituted strict financial controls on the Debtor, and required the deposit of all income received from any source into an MB Financial account, with disbursements to be made only upon approval of MB Financial. On or about June 7, 2009, all of the

1 proceeds from the sale of the Sold Equipment were paid to MB Financial (hereinafter
2 referred to as the “Transfer”).

3 9. At the time of the Transfer, MB Financial was owed a substantial unsecured
4 debt by the Debtor, which had been in existence for more than one year.

5 10. At the time of the Transfer, the Debtor was insolvent.

6 11. The Transfer was made within 90 days prior to the Petition Date.

7 12. The Transfer enabled defendant MB Financial to receive more than it would
8 have received if the case were a case under chapter 7 of the Bankruptcy Code, the Transfer
9 had not been made, and defendant MB Financial received payment of such debt to the extent
10 provided for by the Bankruptcy Code.

11 13. The Transfer is an avoidable preferential transfer in accordance with Title 11
12 U.S.C. §547(b).

13 WHEREFORE, WES prays for relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF

(Equitable Subordination)

16 14. Plaintiff hereby incorporates each and every averment set forth in paragraphs
17 1 through 13 above as if fully set forth herein.

18 15. Commencing approximately in March of 2009, defendant MB Financial
19 embarked upon a program designed to control WES with the sole purpose of providing the
20 maximum financial benefit to MB Financial, including:

21 a. Demanding that all deposits be made directly into an MB Financial
22 account;
23 b. Threatening key employees by stating that if any payments were
24 diverted other than being deposited directly into MB Financial's bank
25 account, it would be considered conversion and legal action would be
26 instituted against them;
27 c. Requiring the approval of MB Financial for each and every check
28 issued by WES, and on occasions, even when checks were authorized,

such checks were subsequently disapproved by MB Financial.

d. Demanding that WES employ Sean Broderick (“Broderick”) as its chief restriction officer, to be paid a fee from WES of \$315.00 per hour, plus expenses. Broderick was employed effective June 18, 2009. Broderick reported directly to MB Financial each day, took directions directly from MB Financial, and refused to take directions from the board or other personnel at WES.

e. The actions of Broderick were designed solely to benefit MB Financial, including assurance that all income to WES was paid directly to MB Financial, that the only creditors paid were those necessary in order to assure future receipts of accounts receivable, and to implement the overall plan of liquidation in order to provide maximum benefit to MB Financial.

16. As a result of the control exercised by MB Financial both directly and through
17 its agent Broderick, WES was stripped of all available cash needed for successful operations;
18 various jobs were delayed; certain vendors were not paid creating a public perception that
19 WES was failing; certain checks previously authorized by MB Financial were subsequently
20 dishonored, which furthered the perception that the company had insufficient cash; and the
company was placed in a position where it was unable to bid upon significant future jobs due
to lack of funding.

21 17. Furthermore, on June 29, 2009, MB Financial circulated to WES a proposed
22 forebearance agreement, insisting that the same be signed no later than July 3, 2009. MB
23 Financial indicated that in the event the forbearance agreement was not signed, it would
24 declare the loans and obligations all due and payable, and take appropriate action. The
25 forbearance agreement specifically provided that additional security would be granted to
26 MB Financial, including any causes of action that the Debtor had against Roy A. Walker and
27 certain other entities.

28 | //

1 18. By its actions, MB Financial essentially assumed control of WES, and placed
2 WES in a position where it could no longer profitably operate its business, and created a
3 public perception that WES was in the process of liquidation.

4 19. Pursuant to 11 U.S.C. §510(c), the claim of MB Financial should be
5 subordinated to all other allowed claims of the Debtor, and the liens securing the claim of
6 MB Financial should be transferred to the estate.

7 | WHEREFORE, Plaintiff prays for relief as follows:

8 1. With respect to the First Claim for Relief, for the recovery of all preferential
9 transfers made to MB Financial, together with the interest thereon, from and after the date
10 of such transfers;

11 2. With respect to the second claim for relief, for an order equitably subordinating
12 the claim of MB Financial to all other creditors of the Debtor, and transferring the lien
13 securing the subordinated claim of MB Financial to the estate;

14 3. With respect to all claims for relief, for reasonable costs and attorney's fees;
15 1

16 4 For such other and further relief as the court shall deem just and proper

17 DATED this 27th day of July, 2009

LAW OFFICES OF ALAN R. SMITH

By: /s/ Alan R. Smith
ALAN R. SMITH, ESQ.
Proposed Attorney for Debtor

Exhibit “A”

WES CONSTRUCTION CO., INC. RBA Auction 05/14/09 - Final											
Type	Sub Type	Equip #	MS Bank or unsecured	RBA Lot #	Title Copy	Actual Proceeds \$150,898 AUCTION	Under \$2500 Surcharge	RBA Commission @ 11%	Rebath, Clean or Repair	Transport	Net Proceeds
40 - Trucks - Diesel	Truck Flatbed Utility	4076	unsecured	702	6,000	2,250	25	41	250	5,065	F250
40 - Trucks - Diesel	Truck Flatbed Utility	4079	unsecured	662	5,000	0	550	41	250	4,159	WES 1999 F350
40 - Trucks - Diesel	Truck Flatbed Utility	4084	unsecured	619	3,000	0	330	41	250	2,379	WES 1999 F450
40 - Trucks - Diesel	Truck Flatbed Utility	4086	unsecured	620	3,000	0	330	281	250	2,139	WES 1999 F450
40 - Trucks - Diesel	Truck Flatbed Utility	4088	unsecured	618	3,500	0	365	41	250	2,624	TS 1999 F550
40 - Trucks - Diesel	Mechanic Diesel	4098	unsecured	373A	4,500	0	485	41	250	3,714	TS 1997 F450-Service
50 - Trucks - Diesel	Trucks Transfer 3-Axe	5098	unsecured	398	20,000	0	2,200	500	500	17,300	TS 2000 Peterbilt 379
60 - Trailers	Trailers Side Dump 20' Yard	6073	unsecured	1586	20,500	0	2,255	250	250	17,985	TS 2004 Front Side Dump TK60SSD
60 - Trailers	Trailers Side Dump 20' Yard	6074	unsecured	1603	5,500	0	605	100	100	4,795	TS 2004 Side Dump Dolly TK2CD
60 - Trailers	Trailers Side Dump 20' Yard	6075	unsecured	1583	20,500	0	2,255	250	250	17,985	TS 2004 Front Side Dump TK60SSD
60 - Trailers	Trailers Side Dump 20' Yard	6076	unsecured	1585	20,500	0	2,255	250	250	17,985	TS 2004 Front Side Dump TK60SSD
60 - Trailers	Trailers Side Dump 20' Yard	6077	unsecured	1602	5,500	0	605	100	100	4,795	TS 2004 Side Dump Dolly TK2CD
60 - Trailers	Trailers Side Dump 20' Yard	6078	unsecured	1594	20,500	0	2,255	250	250	17,985	TS 2004 Rear Side Dump TK60SSD
60 - Trailers	Trailers Lombo Tag	6079	unsecured	1554	3,500	0	385	250	250	2,885	TS 2001 24 Ton Flatbed TR24-2400
60 - Trailers	Trailers First Transfer	6090	unsecured	495	0	0	0	200	200	(200)	2005 Transfer Reliance 3TR0H-D24
60 - Trailers	Trailers Second Transfer	6091	unsecured	1599	9,500	0	1,045	1,045	1,045	8,455	TS 2005 Transfer Reliance 3TR0H-D24
60 - Trailers	Trailers First Transfer	6092	unsecured	496	0	0	0	41	500	(541)	2005 Transfer Reliance 3TR0H-D24
60 - Trailers	Trailers Second Transfer	6093	unsecured	1598	10,000	0	1,100	200	8,700	TS 2005 Transfer Reliance 3TR0H-D24	
60 - Trailers	Trucks Transfer 3-Axe	6078	unsecured	1605	6,000	0	660	5,340	5,340	1,950	20 belly dump TR24-2400
40 - Trucks - Diesel	Pickup Diesel	40108	unsecured	701	5,500	0	605	41	250	4,604	TS 2000 F250 Pickup AX4
40 - Trucks - Diesel	Truck Flatbed Utility	40110	unsecured	617	3,500	0	385	41	250	2,824	TS 2000 F550 Flatbed 2X4
40 - Trucks - Diesel	Pickup Gasoline	40111	unsecured	714	3,000	0	330	168	250	2,252	TS 2000 F150 Pickup AX4
40 - Trucks - Diesel	Truck Flatbed Utility	40112	unsecured	588	5,500	0	605	41	250	4,854	TS 2001 F450 Flatbed 2X4
40 - Trucks - Diesel	Truck Flatbed Utility	40117	unsecured	587	5,500	0	605	41	250	4,604	TS 2001 F450 Flatbed 2X4
40 - Trucks - Diesel	Pickup Diesel	40119	unsecured	678	7,000	0	770	41	250	5,939	TS 2001 F250 Pickup AX4
40 - Trucks - Diesel	Pickup Gasoline	40122	unsecured	708	3,500	0	385	386	250	2,479	TS 2000 C-20 1500 Pickup EXT-CAB 2X4
40 - Trucks - Diesel	Truck Flatbed Utility	40127	unsecured	604	6,000	0	660	41	250	5,049	TS 2001 F350 Flatbed 2X4
50 - Trucks - Diesel	Trucks Transfer 3-Axe	50109	unsecured	496	55,000	0	6,050	200	46,750	TS 2005 T-900 KW - T900	
50 - Trucks - Diesel	Trucks Transfer 3-Axe	50110	unsecured	485	64,000	0	7,040	41	500	56,419	TS 2005 T-900 KW - T900
50 - Trucks - Diesel	Trucks Dump 5' 1/2-Axe	50112	unsecured	511	9,500	0	1,045	250	250	8,205	TS 1999 F450 Dumping 2X4
50 - Trucks - Diesel	Trucks Tractor 3-Axe	50121	unsecured	356	20,000	0	2,200	41	500	17,259	TS 2000 3-Axe Tractor
50 - Trucks - Diesel	Trucks Water 3-Axe	50125	unsecured	477	23,000	0	2,530	700	18,235	TS 2000 3-Axe Water Truck	
60 - Trailers	Trailers Side Dump 20' Yard	60104	unsecured	1591	20,500	0	2,255	250	17,985	TS 2005 Front Side Dump TK60SSD	
60 - Trailers	Trailers Side Dump 20' Yard	60106	unsecured	1592	20,500	0	2,255	250	17,985	TS 2005 Rear Side Dump TK60SSD	

EXHIBIT "A"